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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

WILLIAM ROBERT WOOLERY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER AN UNDULY AND IMPERMISSIBLY SUGGESTIVE PRETRIAL "LINEUP" PROCEDURE DENIED PETITIONER DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS WHERE, UNDER THE *MANSON VS. BRATHWAITE* "TOTALITY OF THE CIRCUMSTANCES" TEST, A MAJORITY OF THE MOST COMPELLING OF THE SIX CONTROLLING FACTORS WEIGHED AGAINST A FINDING OF RELIABILITY.

II. WHETHER THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN PETITIONER'S CONVICTION FOR ATTEMPTED POSSESSION WITH INTENT TO DISTRIBUTE, ESPECIALLY SINCE THERE WAS ABSOLUTELY NO CONNECTION SHOWN BETWEEN HIM AND THE ULTIMATE DESTINATION OF THE CONTRABAND.

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2. Whether the evidence was insufficient as a matter of law to sustain Petitioner's conviction for attempted possession with intent to distribute, especially since there was absolutely no connection shown between him and the ultimate destination of the contraband.	
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PRAYER

The Petitioner, WILLIAM ROBERT WOOLERY, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on June 20, 1984.

OPINIONS AND JUDGMENTS ISSUED IN THE COURT BELOW

A true and correct reproduction of the opinion of the United States Court of Appeals for the Fifth Circuit is annexed hereto as "Appendix A." In a per curiam opinion, the Panel, composed of Circuit Judges Jolly, Higginbotham and Davis, held that (1) though the pretrial

identification procedure was unnecessarily and unduly suggestive, the in-court identification was nonetheless reliable under the *Manson v. Brathwaite*[1] "totality of the circumstances" test; and (2) the evidence was sufficient as a matter of law to sustain the conviction for attempted possession with the intent to distribute cocaine.

Petitioner timely took issue with the opinion by filing his Petition for Panel Rehearing and Suggestion for Rehearing En Banc. A true and correct copy of the Petition for Panel Rehearing is annexed under Appendix "B."

On August 21, 1984, a second per curiam opinion, annexed as "Appendix C", was handed down on rehearing by the Panel. Reaffirming its original opinion as to the admissibility of the "tainted" in-court identification, the Panel went so far as to note that "tainted" identification could still be considered reliable, even if a majority of the *Manson* factors weighed against reliability. Petitioner respectfully says that such a position renders the phraseology "totality of the circumstances," an otherwise simple and intelligible standard, absolutely meaningless.

In briefly discussing the sufficiency of the evidence issue, the Opinion on Panel Rehearing did retreat somewhat on its initial recitation of the facts given in support of its conclusion. Specifically, the Panel now appears to concede that the evidence did *not* connect Petitioner to the ultimate destination of the contraband, nor did it show that he ever contacted the delivery service or made use of telephone answering machines. Nonetheless, the Panel reaffirmed its position on both issues and upheld its initial disposition of affirmance.

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1. *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit became final on August 21, 1984, and, it having affirmed judgment of conviction in the District Court, jurisdiction of the Honorable Supreme Court is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution says:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment at a grand jury, except in cases arising in the land or naval forces, or in the militia, when in the actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

On August 6, 1979, federal agents discovered cocaine secreted in a shipment of two saddles from Colombia. The crates that contained the saddles were addressed to a Richard Freedman. A telephone number was also listed, but agents later learned that it was a number for an answering service, not shown to be connected in any way to Petitioner.

On August 9, 1979, an *unknown* person, identifying himself as Richard Freedman, called Braniff Airlines and

inquired about the package. It was stipulated by the Government that the caller who identified himself as Richard Freedman was *not* Petitioner, as the Government had compared Petitioner's voice exemplars with a tape of the person claiming to be Richard Freedman. The *unknown* caller, purporting again to be Richard Freedman, called a Customs brokerage firm (W. R. Zanes) to pick up the package from Braniff. Agents informed Zanes about the contents of the saddle crate and subsequently set up surveillance in and about the Zanes warehouse.

Meanwhile, a "Richard Freedman" (again stipulated *not* to be Petitioner) telephoned Suburban Delivery Service and requested that a driver go to a restaurant parking lot so that arrangements could be made to pick up a package. The driver for Suburban, Lawrence Lopez, accompanied by his son, went to the designated parking lot and ultimately met up with two men who were in a Mercedes-Benz automobile. The driver of the Mercedes got out and approached Mr. Lopez, who asked, "Richard Freedman?" The driver nodded affirmatively, paid for the storage and delivery fees, and requested the driver to take the package to a Houston address and to leave the package if no one was there.

When Lopez and his son arrived at Zanes to pick up the package, they were immediately arrested by federal agents who intimidated and threatened Mr. Lopez with jail. Subsequently, Petitioner and another man named Jean Michael Rebescher were arrested in the Mercedes. Agents stated that the two occupants of the Mercedes looked suspicious and appeared to be keeping an eye on the Suburban delivery truck.

Using several other police officers as "stand-ins", the agents put Petitioner and Rebescher in a lineup that was conducted at the nearby Customs office. This was after Mr. Lopez had been threatened about all the "trouble" he was in and that "someone was going to jail" and that they (the agents) could subpoena him and *make* him identify the man.

The Fifth Circuit has already found that the lineup procedure was unduly and impermissibly suggestive. First, the officers told Mr. Lopez and his son that they had *just arrested* the two people outside the Zanes Warehouse. An agent named Mike Tiffin even told Lopez, "You'd better hope the man you saw at [Denny's] is in this line-up." When Mr. Lopez erroneously picked out a Sheriff's deputy as the man who he met in the restaurant parking lot, the officers all but told him that he had picked out the wrong man. Mr. Lopez was next allowed to *see and hear* his son pick Petitioner out of the lineup. After that, officers asked Mr. Lopez if he would like a "second chance," whereupon Mr. Lopez naturally picked out Petitioner as the driver of the Mercedes.

Lopez admitted that his in-court identification was based, at least in part, upon his having seen Petitioner at the "lineup." Crucial aspects of Lopez's testimony on cross-examination are set out at "Appendix D."

REASONS FOR ALLOWANCE OF THE WRIT

1. The Fifth Circuit's opinion in this case offends and conflicts with the Supreme Court's decision in *Manson v. Brathwaite, supra,* as well as its own prior opinions on the admissibility of tainted identification, to-wit: *Swicegood v. Alabama,* 577 F.2d 1322 (5th Cir. 1978); *United States v. Cueto,* 611 F.2d 1056 (5th Cir. 1980).

2. This case presents an important federal question that should be addressed so as to promote uniformity in federal decisions on the substantive law of attempt. Specifically, Petitioner says that the substantive law of attempt as set out by the Eighth Circuit in *United States v. Joyce*, 693 F.2d 838 (8th Cir. 1982), should be formally adopted and approved by the Supreme Court as the standard by which evidence in attempt cases must be gauged.

ARGUMENT

A. When does the *Manson v. Brathwaite* "reliability" criteria tilt in favor of the accused?

After holding the "lineup" procedure unduly and impermissibly suggestive, the Fifth Circuit Panel broke down the *Manson v. Brathwaite* criteria as follows:

1. *Opportunity to View:* Weighed by the Panel in favor of the Government. Mr. Lopez was in the presence of the driver of the Mercedes long enough to get paid and receive directions.

2. *Degree of Attention:* WEIGHED BY THE PANEL IN FAVOR OF PETITIONER. There was no particular reason to view the driver of the Mercedes as anything other than a normal, routine encounter with a client. In fact, Mr. Lopez admitted at the hearing on the Motion to Suppress Identification that he was not paying much attention to the man. His confusion at the lineup backs up his statement.

3. *Description Given:* Weighed by the Panel in favor of the Government. Petitioner says that the description was *not* as detailed and accurate as the Fifth Circuit

panel concludes.[2] Lopez said he was uncertain if the driver of the Mercedes even had a beard. See a photograph of the "lineup" at Appendix "E" with Petitioner being situated on the far right.

4. *Level of Certainty:* WEIGHED BY THE PANEL IN FAVOR OF PETITIONER. Mr. Lopez was not only uncertain, but he picked out a Sheriff's Deputy named Peeples upon his first viewing. Even though Lopez supposedly said the driver of the Mercedes had on a white T-shirt, Peeples was not wearing such a shirt. Officer Peeples is shown as the third person from the left, wearing a blue T-shirt that says "Where the hell is Laredo, Texas?" on the front of it. See "Appendix E."

5. *Passage of Time:* Weighed by the Panel in favor of the Government. Though the lineup took place that same afternoon of Petitioner's arrest, it was accompanied by overwhelming intimidation and pressure to identify someone. Mr. Lopez testified that he was worried that he would go to jail if he were unable to identify someone in the lineup. THE SHORT PASSAGE OF TIME DID NOT SERVE THE ENDS OF RELIABILITY UNDER THESE FACTS. See "Appendix D."

6. *Corrupting Effect of the Suggestiveness:* CLEARLY SHOULD HAVE WEIGHED IN FAVOR OF PETITIONER. Mr. Lopez was arrested, threatened with jail, intimidated, told that "You'd better hope you see the man in that lineup," allowed to see and hear his son's participation in the "lineup," virtually told he picked out the "wrong" man and asked if he would like a "second

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2. As noticed by the Fifth Circuit in *Swicegood, supra,* the fact of a reasonably accurate description is less compelling where several others in the "lineup" also fit that description. See 577 F.2d at 1328-1329.

chance." Acknowledging that Lopez testified at trial that his in-court identification was based at least in part upon what had happened at the "lineup," the Fifth Circuit nonetheless somehow concluded that the corruptive effect was minimal. The Panel pointed to the fact that Mr. Lopez "explicitly identified" Woolery at the trial. That argument is circular and uses the very thing sought to be prevented as a means of justifying it once it happened; that is, the agents having intimidated, prompted, threatened, and suggested Mr. Lopez into an identification at the "lineup," his "explicit identification" *at trial* cures the disease?

The Fifth Circuit has in the past discounted the significance of a witness's certainty at trial where officers had already told him he picked out the "right" man. Cf. *Swicegood, supra,* at 577 F.2d at p. 1329. For some reason the Panel here refused to apply that sound rationale. Simply put, it is doubtful that Mr. Lopez would have been able to identify Petitioner had he not been subjected to the unconstitutional scenario that the agent led him through.

The second, fourth and sixth factors clearly weighed in Petitioner's favor; the description given lends little to the overall reliability because Lopez was uncertain about the man having a beard and first chose someone who was not even wearing a white shirt, as he had supposedly told officers. Moreover, several of the participants fit that general description. Lastly, the brief passage of time in this particular factual setting compounded the due process violation. When the *Manson* factors weigh in favor of the accused, how then can reliability be extracted from the "totality of [such] circumstances." The *Manson* criteria has been tortured in this case.

B. In search of a uniform substantive law of attempt.

In *United States v. Joyce, supra,* the United States Court of Appeals for the Eighth Circuit held that, before one can be guilty of criminal attempt, the attemptor's act *must so surpass the preparatory stage that, if not interrupted, it would result in the commission of a crime.*

While the District Court granted Petitioner's request that the jury in this case be so instructed, the Fifth Circuit declined to even recognize such as the substantive law of attempt, much less apply it to the facts here presented. Instead, the Fifth Circuit Panel held that an attempt is complete whenever a defendant engages in conduct that constitutes *a substantial step towards the commission of a crime, as opposed to "mere preparation,"* provided that the objective acts of the defendant without regard to *mens rea,* "mark the defendant's conduct as criminal in nature" and "should be unique rather than so commonplace that they are engaged in by persons not in violation of the law." [Citing *United States v. Mandujano,* 499 F.2d 370 (5th Cir. 1974); *United States v. Oviedo,* 525 F.2d 881 (5th Cir. 1976).]

Petitioner respectfully says that the substantive law of attempt used in the Fifth Circuit is vague, open-ended and fails to draw any meaningful guidelines as to when a "substantial step" has been taken, as opposed to "mere preparation." However, even applying the law of attempt as approved by the Fifth Circuit, the evidence was insufficient as a matter of law.

Petitioner's conduct was as consistent with innocence as it was with guilt. There was absolutely no evidence that Petitioner knew what the packages contained or that he had any connection with the shipment of the

same from Colombia. Likewise, there was no connection shown between Petitioner and the package's ultimate destination. Moreover, it was affirmatively proven that Petitioner did not make any of the telephone calls to Zanes or to the Suburban Delivery Service. On the other hand, the passenger, Jean Michael Rebescher,[3] was shown to have had an account at the answering service whose address was shown as the ultimate destination of the package. For all the record shows, Petitioner was an innocent dupe being used by Rebescher.

Finally, without uniformity in the substantive law, it is impossible to guarantee equal protection of it. Petitioner says that the Eighth Circuit's view of the substantive law of attempt is the better reasoned and should be made uniform throughout the country. In fact, the Eighth Circuit, in adopting what should be the law throughout the land, looked to and adopted the Tenth Circuit's decision in *United States v. Monholland,* 607 F.2d 1311 (10th Cir. 1979).

The substantive law of attempt, as recognized in the Eighth and Tenth Circuits, cannot be squared with that in the Fifth Circuit. Such confusion and lack of uniformity should be laid to rest.

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3. For some unexplained reason, the charges against Rebescher were dismissed before Petitioner went on trial.

CONCLUSION

For these reasons, Petitioner respectfully prays that this Honorable Court will grant this his Application for Writ of Certiorari and that he will be given the opportunity to further brief and argue the issues raised herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Lewis Dickson, a member of the Bar of this Court, certifies that pursuant to Rule 28, he served the preceding Petition for Writ of Certiorari by enclosing three (3) copies of this document in an envelope, first-class postage prepaid and addressed to:

Mr. James R. Gough
Office of the U. S. Attorney
Appellate Division
P. O. Box 61129
Houston, Texas 77208-1129,

and depositing the envelopes in the United States Post Office, San Jacinto Station, Houston, Texas 77002, on October _____, 1984, and further certifies that all parties required to be served have been served.

LEWIS DICKSON

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

William Robert WOOLERY,
Defendant-Appellant.

No. 83-2606

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

June 20, 1984.

Defendant was convicted before the United States District Court for the Southern District of Texas, Carl O. Bue, Jr., J., of attempted possession of cocaine with intent to distribute, and he appealed. The Court of Appeals held that: (1) although lineup was unnecessarily suggestive, reliability of witness' identification of defendant was not so impaired as to mandate exclusion of identification evidence; (2) evidence, including fact that defendant arranged for delivery of cocaine to its ultimate destination, was sufficient to sustain conviction; and (3) defendant's involvement in delivery of cocaine to its ultimate destination took him beyond "mere preparation," and thus attempt conviction was proper.

Affirmed.

Lewis Dickson, Houston, Tex., for defendant-appellant.

Daniel K. Hedges, U.S. Atty., James R. Gough, Asst. U.S. Atty., Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:

Defendant William Robert Woolery appeals his conviction of a single count of attempted possession with intent to distribute cocaine.

I.

The transaction which forms the basis for the conviction began when customs officials discovered cocaine in a shipment of saddles from Colombia.[1] The addressee was a "Richard Freedman," and a telephone number was given. After an airline official left word with the answering service at that telephone number, a man identifying himself as Freedman[2] telephoned the airline and told them the package would be picked up that day. Freedman had the W.R. Zanes Warehouse pick up and store the package. He then telephoned Suburban Delivery Com-

1. A more detailed recitation of the facts appears in *United States v. Woolery*, 670 F.2d 513, 514-5 (5th Cir. 1982) (reversal of order granting defendant's motion to suppress evidence obtained after illegal arrest).

2. Though a voice print analysis showed that the person who telephoned was not Woolery, the man who met Lopez in the parking lot was Woolery, although he responded to the name of "Richard Freedman." In setting forth the facts, the name "Freedman" will be used to refer to Woolery when he used the alias for the meeting with Lopez. Elsewhere, Woolery is Woolery.

pany to arrange for collection of the package from the Zanes Warehouse. Lawrence Lopez, a driver for Suburban Delivery, was sent by his dispatcher to the parking lot of a Denny's restaurant near the warehouse to meet Freedman and receive his instructions.

According to Lopez's trial testimony, he arrived at the parking lot fifteen or twenty minutes early, open-ended in his pickup truck with his son for forty-five minutes until a man approached the driver's side of the truck. Lopez said, "Mr. Freedman?," and the man replied, "Yes."

Lopez got out of the truck and stood two to three feet from Freedman as they spoke. Freedman paid Lopez in cash for delivery and storage services, instructed him to deliver the package to a Houston address, obtained a receipt, and left. It was early afternoon, shortly after lunchtime.

Witnesses testified that Lopez then moved his delivery truck to the warehouse, and was followed by a dark Mercedes with two occupants. When Lopez came to a stop, so did the car, parking across the street. The driver got out of the car, walked around to the front and raised the hood, as if to check the engine. However, according to the testimony, the driver never took his eyes off Lopez's truck. Lopez then moved the delivery van to the rear of the warehouse, and again the car followed, parking within sight of both.

When Lopez entered the warehouse, he was met by police who informed him that the package contained contraband and that he was "in trouble," according to Lopez's testimony. At this point, officers obtained a description of Freedman from Lopez, and the delivery address (which was that of the telephone answering

service). They placed Freedman and his companion under arrest, and arranged a line-up for Lopez and his son at the nearby customs office. The sequence of events at the line-up was as follows: first, Lopez entered the line-up room and selected a man who was not Woolery. DEA agent Perry asked Lopez if he was sure, and Lopez stated that he was not. Second, Lopez's eleven-year-old son who had been with him in the parking lot stepped to the door. Within the hearing of his father, he pointed to the defendant Woolery as the man in the parking lot. Third, an agent then asked Lopez again if he was sure about his selection, and encouraged him to take another look. It was then that Lopez, Sr., selected Woolery as the man he had met in the parking lot who had identified himself as Freedman.

At trial, Lopez and his son both identified Woolery as the man they had seen in the Denny's parking lot. Lopez recalled the description he had given the officers that day, stating that the man was five-feet-seven- or five-feet-eight-inches tall, with a beard and mustache, wearing a white shirt, blue jeans, and brown boots. Lopez stated that his in-court identification of Woolery was based both on what he had seen in the line-up and what he recalled from the day in the parking lot.

The jury found Woolery guilty of the attempted possession with intent to distribute count, and acquitted him of the cocaine importation count. 21 U.S.C. §§ 846, 841(a)(1), 952. Woolery was sentenced to four years in prison, followed by a special parole term of three years. Woolery is currently free on bond, which was continued on appeal at his sentencing. Woolery filed a timely notice of appeal.

II.

Woolery raises two issues on appeal. First, he argues that the line-up identification by Lopez was impermissibly suggestive and resulted in a substantial likelihood of irreparable misidentification. Second, he argues that the evidence was insufficient to support a verdict of attempted possession with intent to distribute. For the reasons set forth below, we find both contentions without merit and affirm his conviction.

III.

A.

Woolery argues that the line-up was impermissibly suggestive[3] because agents' conduct suggested that Lopez had made a mistake the first time and should try again. Woolery also maintains that the line-up procedure was unduly coercive in the light of Lopez's statement on cross-examination that he had been threatened with jail and that he felt that he could "go free" if he could identify the right person. Woolery argues further that under *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the identification evidence is excludable because it is unreliable, based on the totality of the circumstances, and would result in a substantial likelihood of misidentification.

[1] Though we agree that the identification procedure was unnecessarily suggestive, we do not feel that its reliability was so impaired as to mandate its exclusion from

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3. Woolery argued for suppression of the identification prior to trial and during the trial. His pre-trial motion to suppress on this basis was denied, and his attempts to have the identification excluded during trial were unsuccessful.

trial under *Manson*. Admissibility of identification evidence is governed by a two-step analysis enunciated in *Passman v. Blackburn*, 652 F.2d 559, 569 (5th Cir. 1981), *cert. denied*, 455 U.S. 1022, 102 S.Ct. 1722, 72 L.Ed.2d 141 (1982). The first step is to determine whether the identification procedure was impermissibly suggestive. The encouragement by agents for Lopez to "take another look and see if you can be sure" came on the heels of his son's selection of the defendant within the hearing of Lopez. Though there is nothing improper in asking an uncertain witness to look at a line-up a second time, it is unacceptable to do so in a way that indicates to the witness whom he should select. The conclusion that the line-up was suggestive is supported further by the agent's insinuations that the witness and his son were "in trouble."

[2] Determination of suggestiveness does not end the inquiry. The second step of the *Manson* analysis requires inquiry into:

> whether under the totality of the circumstances the suggestiveness leads to a substantial likelihood of irreparable misidentification. . . . Under this analysis "reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977). Thus, an identification found to be reliable will be admitted even though the confrontation procedure was suggestive.

Passman v. Blackburn, 652 F.2d at 569.

[3] Six factors have been identified in this circuit for evaluating the risk of misidentification. According to *United States v. Atkins*, 698 F.2d 711, 713 (5th Cir. 1983), they are:

> (1) the opportunity of the witness to view the criminal, (2) the witness' degree of attention, (3) the accuracy of the description, (4) the witness' level of certainty, (5) the elapsed time between the crime and the identification, and (6) the corrupting influence of the suggestive identification itself.

[4] The reliability of the identification must be assessed with reference to these six factors: (1) Lopez's opportunity to view Freedman occurred "at close range under good light for several minutes." *Allen v. Estelle*, 568 F.2d 1108, 1114 (5th Cir. 1978). Lopez stood two to three feet from Freedman, face-to-face, in broad daylight. Though Lopez did not testify precisely how long their transaction lasted, it was long enough for Freedman to pay his bill, tell Lopez where to leave the package, and obtain a receipt. Conditions here were superior to those in *Manson*, where the witness saw the defendant through an open doorway as he stood in a hallway illuminated by natural light. 432 U.S. at 100-1, 97 S.Ct. at 2246. (2) At the time of the meeting in the parking lot, Lopez had no reason to see Freedman as anything but another client. Thus, his attention was probably not particularly focused, compared to, say, the attention of the bank teller being robbed in *Atkins*. (3) Lopez's description was detailed and came minutes after his meeting with "Freedman" in the parking lot. The photograph of the line-up reveals the description was accurate, both as to facial hair and clothing. (4) Lopez was uncertain at the first viewing of the line-up. The man he chose the first time closely resembled the defendant as to height, facial hair, and hairline. The defendant was standing the farthest away from the witness in the office where the line-up took place. Lopez exhibited certainty at trial that Woolery

was the man he had seen in the parking lot. (5) The line-up took place the afternoon of the meeting and arrest. "We do not have here the passage of weeks or months between the crime and the viewing" of the line-up. *Manson,* 432 U.S. at 116, 97 S.Ct. at 2253-4. (6) It is difficult to assess the corrupting influence of the suggestive identification, since Lopez admitted that his in-court identification was a product of both the line-up and the initial meeting. However, at trial, Lopez explicitly identified Woolery as the man he had "met at Denny's and who acknowledged that he was Richard Freedman."

Under the "totality of the circumstances" test, there is ample basis for concluding that the identification was a reliable one. We cannot say there was a very substantial risk of irreparable misidentification, a necessary element of a due process violation. *See Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967). Therefore, the district court properly admitted the identification testimony of Lopez.

B.

[5] Woolery's second contention on appeal is that the evidence was insufficient to sustain the conviction for attempted possession with intent to distribute under the sufficiency of the evidence standard of *United States v. Bell,* 678 F.2d 547, 549 (5th Cir. 1982) (en banc). Woolery's argument hinges largely on his contention that "at no time did the Defendant Woolery ever state that he was 'Mr. Freedman,' " thus no connection was established between Woolery and the contraband, and its ultimate destination. Therefore, "a reasonable trier of fact" could not conclude that Woolery was guilty beyond a reasonable doubt.

Woolery's argument must fail, particularly in the light of Lopez's testimony that the defendant answered affirmatively to the inquiry, "Mr. Freedman?" *Bell* does not require that "the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except guilt, provided a reasonable trier of fact could find guilt beyond a reasonable doubt." *United States v. Bell,* 678 F.2d at 549; *United States v. Sneed,* 705 F.2d 745, 749 (5th Cir. 1983) (citations omitted). Viewing the evidence most favorably to the government, *United States v. Chanya,* 700 F.2d 192, 195 (5th Cir. 1983), we conclude that a reasonable trier of fact could find that Woolery attempted to possess the cocaine with intent to distribute it. As this court stated in its earlier opinion, finding probable cause to arrest Woolery, the agents "witnessed the suspect engaging in activity centering on known contraband, activity that had no legitimate or logical explanation." *United States v. Woolery,* 670 F.2d 513, 516 (5th Cir. 1982) (reversed district court's order granting motion to suppress evidence obtained after illegal arrest).

[6, 7] Similarly, Woolery's contention that his actions did not constitute a criminal attempt under *United States v. Mandujano,* 499 F.2d 370, 376 (5th Cir. 1974), is without merit. *Mandujano* requires that the defendant have engaged in conduct "which constitutes a substantial step toward commission of the crime" before an attempt conviction is allowed to stand. *United States v. Mandujano,* 499 F.2d at 376. In other words, "mere preparation" for criminal activity is not sufficient to sustain an attempt conviction. *See United States v. Oviedo,* 525 F.2d 881, 885 (5th Cir. 1976). On these facts, Woolery's involvement in the delivery of the cocaine to its ultimate destina-

tion took him beyond "mere preparation." The goal in *Oviedo* is that objective acts of the defendant without regard to *mens rea* "mark the defendant's conduct as criminal in nature. The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law." *Id.* Only then may an attempt conviction stand.

Here, use of two delivery services, use of answering machines, and the conspicuous surveillance by Woolery and his companion of Lopez's delivery truck constitute precisely the type of "objective acts" which mark Woolery's conduct as criminal in nature, and evidence "commitment to the criminal venture and corroborate the mens rea." *Id.*

III.

The conviction of one count of attempted possession with intent to distribute is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 83-2606

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM ROBERT WOOLERY,
Defendant-Appellant.

DEFENDANT-APPELLANT'S PETITION
FOR PANEL REHEARING

APPEAL FROM THE UNITED STATES DISTRICT
FOR THE SOUTHERN DISTRICT OF TEXAS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 83-2606

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM ROBERT WOOLERY,
Defendant-Appellant.

DEFENDANT-APPELLANT'S PETITION
FOR PANEL REHEARING

COMES NOW WILLIAM ROBERT WOOLERY, Defendant-Appellant herein, and pursuant to Rule 40 of the Federal Rules of Appellate Procedure, and Section 5(c) of the Internal Operating Procedures for the United States Court of Appeals for the Fifth Circuit, files this his Petition for Panel Rehearing, as follows:

1. CERTIFICATE OF INTERESTED PERSONS. This being a criminal case, no certificate is required.

2. STATEMENT OF COUNSEL. I expressly believe, based upon a reasoned and studied professional judgment, that the panel decision is contrary to the decisions of the United States Court of Appeals for the Fifth Circuit and the Supreme Court of the United States, and further, that reconsideration by the Panel is necessary to secure and maintain uniformity of decisions of this court:

Manson v. Brathwaite, 432 U.S. 98 (1977)
United States v. Sutherland, 428 F.2d 1152 (5th Cir. 1973)
United States v. Mann, 557 F.2d 1211 (5th Cir. 1977)
United States v. Allison, 616 F.2d 779 (5th Cir. 1980)

STATEMENT OF THE GROUNDS MERITING PANEL RECONSIDERATION

GROUND NUMBER ONE

WHETHER THE PANEL'S CONCLUSION OF RELIABLE IN-COURT IDENTIFICATION WAS ERRONEOUS, SINCE AT LEAST FOUR OF THE SIX *MANSON*[1] FACTORS MILITATE IN FAVOR OF FINDING A VERY SUBSTANTIAL RISK OF IRREPARABLE MISIDENTIFICATION.

GROUND NUMBER TWO

WHETHER THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN DEFENDANT-APPELLANT'S CONVICTION FOR ATTEMPTED POSSESSION WITH INTENT TO DISTRIBUTE, ESPECIALLY SINCE THERE WAS ABSOLUTELY NO CONNECTION SHOWN BETWEEN HIM AND THE ULTIMATE DESTINATION OF THE CONTRABAND.

STATEMENT OF THE COURSE OF THE PROCEEDINGS AND DISPOSITION OF THE CASE

Defendant-Appellant, WILLIAM ROBERT WOOLERY, was convicted in the Southern District of Texas for attempting to possess cocaine with intent to distribute it, in violation of Title 21, United States Code, § 846. His punishment was set at four (4) years' confinement, followed by a special parole term of three (3) years.

---

1. *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed. 140 (1977).

In a per curiam opinion, the panel, composed of Circuit Judges Jolly, Higginbotham and Davis, held that (1) through the pretrial identification procedure was unnecessarily and unduly suggestive, the in-court identification was nonetheless reliable under the "totality of the circumstances" test; and (2) the evidence was sufficient, as a matter of law, to sustain the conviction for attempted possession with the intent to distribute.

STATEMENT OF FACTS

Briefly, the evidence established that federal agents discovered a quantity of cocaine secreted in some leather saddles that had apparently been shipped from Colombia. Some unknown person purporting to be a Richard Freedman called the airline and stated that the crate in question would be picked up. It was uncontroverted that this unknown caller was not Defendant-Appellant; in fact, the Government's own evidence absolved him of that suspicion. Subsequently, either the same or another unknown person, purporting to be Richard Freedman, called a Customs brokerage firm and requested that the package be picked up from the airline. Someone (unknown) also telephoned Suburban Delivery Service and requested them to pick the package up from the Customs brokerage firm (W. R. Zane).

The delivery service dispatched one of its drivers, Mr. Lopez, to meet a Mr. Freedman at a restaurant parking lot. There Mr. Lopez met who he testified was Defendant-Appellant, who, according to Lopez, paid him and told him to deliver the package at a certain address in Houston.

Lopez, accompanied by his son, went to the W. R. Zane Warehouse at the Houston Intercontinental Airport. When Lopez arrived at the airport, surveillence officers

noticed Defendant-Appellant (driver) and another man, Jean Michael Rebescher (passenger), parked in the vicinity. Officers testified that Defendant-Appellant got out of the vehicle and appeared to be watching Mr. Lopez.

Lopez was immediately arrested upon his entry into the pickup area, and subsequently, Defendant-Appellant and the passenger, Jean Michael Rebescher, were arrested. An unduly suggestive lineup was conducted, and after some prompting and intimidation, Mr. Lopez, Sr., identified Defendant-Appellant as the man who had paid him the money in the restaurant parking lot.

While Defendant-Appellant generally agrees with the Statement of Facts as are set out by the panel opinion, there are several crucial aspects of the factual rendition with which he takes issue. These are as follows:

Misapprehension of Fact Number One

At footnote 2 of page 2 in the opinion, it is said that, "The man who met Lopez in the parking lot was Woolery, and used the alias 'Richard Freedman.'" Defendant-Appellant respectfully says that this is unsupported by the record. Viewing the evidence in the light most favorable to the Government, Mr. Lopez approached Defendant-Appellant and said: "Mr. Freedman?", whereupon Defendant-Appellant replied, "Yes." In other words, the "yes" answer meaning that he was there to pay for the package addressed to Richard Freedman.

Misapprehension of Fact Number Two

On page 2 of the opinion it is written:

> "Lopez asked him if he was Mr. Freedman and the man replied that he was."

Again, Defendant-Appellant says that this is not accurate and amounts to an improper subjective interpretation of the record. The facts are as set out above.

Misapprehension of Fact Number Three

In the second-to-last paragraph of page 8, the opinion says:

> "Here, use of two delivery services, use of answering machines, and the conspicuous surveillance by Woolery and his companion of Lopez's delivery truck, constituted precisely the type of 'objective acts' which mark Woolery's conduct as criminal in nature, and evidence 'commitment to the criminal venture and corroborate the mens rea.' *Id.*

There was absolutely no evidence that Defendant-Appellant engaged the services of either W. R. Zane or the delivery outfit that Mr. Lopez worked for. To the contrary, the Government's evidence conclusively demonstrated that it was *not* Defendant-Appellant.

Likewise, there is absolutely no evidence that Defendant-Appellant ever used any answering machines or that he telephoned anybody at anytime, or was in any way connected with the tape recording of any incoming calls on any answering machine, anywhere.

ARGUMENT AND AUTHORITIES

GROUND ONE RESTATED

WHETHER THE PANEL'S CONCLUSION OF RELIABLE IN-COURT IDENTIFICATION WAS ERRONEOUS, SINCE AT LEAST THREE OF THE SIX *MANSON* FACTORS MILITATE IN FAVOR OF FINDING A VERY SUBSTANTIAL RISK OF IRREPARABLE MISIDENTIFICATION.

The panel opinion has already held that the "lineup" procedure and tactics employed in connection therewith were unnecessarily and unduly suggestive. The opinion concludes, however, that, given the admittedly unduly suggestive procedure, the in-court identification was nonetheless reliable because of what is sometimes referred to as the *Manson* "totality of the circumstances" test.

In *Manson v. Brathwaite, supra,* the Supreme Court set out some six factors that should be used as a guideline to measure whether or not certain suggestive procedures are inclined to bring about an in-court identification that is unreliable, or, stated another way, one that gives rise to a very substantial likelihood of an irreparable misidentification. While Defendant-Appellant says that those factors need not be regurgitated here, suffice it to say that at least four out of the six weighed in his favor; that is, in favor of finding Mr. Lopez, Sr.'s in-court unreliable, and thus something that should have been excluded from the testimony before the jury.

Specifically, under the second factor (degree of attention), the opinion correctly puts Mr. Lopez, Sr. in the category of being a "casual observer", as was referred to in the *Manson* opinion. The opinion candidly admits that "Lopez had no reason to see Freedman as anything but another client." Op. at p. 6.

Next, under the fourth factor (level of certainty), the panel opinion again candidly admits that Mr. Lopez, Sr. was uncertain of his identity. The opinion then attempts to "rehabilitate" the uncertainty on Mr. Lopez's part by noting that "Lopez exhibited certainty at trial that Woolery was the man that he had seen in the parking lot." That observation, even if it were true, has no place in

analyzing the second "prong" of the *Manson* formula. Moreover, that is the very reason why due process has been violated under the circumstances here presented; that is, because once a witness sees someone in a lineup and, on account of improper suggestion, focuses on that witness, irreparable harm has been done. From that point on, the identity of the person suggested is irreversibly fixed in the mind of the witness and, with the passage of time, the witness will understandably become more and more convinced in his own mind. This is even more the case where the witness has been influenced, directly or indirectly, by law enforcement officers. In fact, in this case it is uncontroverted that Mr. Lopez, Sr. admitted that his identification was based, partly, on his having seen Defendant-Appellant at the lineup and his recollection of him on that occasion.

The sixth factor (corrupting influence) is noted as being "difficult to assess" by the panel. See Op. at p. 6. However, the panel highlights the evil result that due process of law seeks to avoid: An in-court identification that stems from a suggestive lineup and not solely from the viewing at the time and on the occasion in question. Again, the panel writes:

> "However, at trial, Lopez explicitly identified Woolery as the man he had 'met' at Denney's and who had acknowledged that he was Richard Freedman."
>
> Under the 'totality of the circumstances' test, there is *ample* basis for concluding that the identification was a reliable one. . . ." Op. at p. 6.

It would fly in the face of human nature to expect anything other than that, by the time the jury trial came around, Mr. Lopez was ready to identify Defendant-

Appellant. After all, by that time he had been charged, hired a lawyer, subjected to bail, and perhaps most significantly, sitting in the courtroom where the defendant sits. At that point, witnesses get caught up in the "ebb and flow" of the tide and are likely to go along with the Government's contentions and the testimony of other witnesses, who have usually discussed the case with one another.

In summary, it is hard to rationalize the conclusion of the panel that there was *ample* evidence, when at least three of the most crucial factors weigh against the Government and in favor of suppressing the in-court identification.

Though in another vein, the pitfalls of unnecessarily suggestive procedures and due process deprivations that flow therefrom were most recently discussed in *United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984). Just as in that case (identification induced by hypnosis, where the witness already knew who was under suspicision), the analytical attempts to "sanitize the suggestiveness" are no less unsuccessful here. This case should be reversed on the grounds of a due process deprivation.

GROUND NUMBER TWO RESTATED

WHETHER THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN DEFENDANT-APPELLANT'S CONVICTION FOR ATTEMPTED POSSESSION WITH INTENT TO DISTRIBUTE, ESPECIALLY SINCE THERE WAS ABSOLUTELY NO CONNECTION SHOWN BETWEEN HIM AND THE ULTIMATE DESTINATION OF THE CONTRABAND.

The panel holds the evidence sufficient and points to factual matters that are not borne out by the record. Those are set out above and specifically include reference to allegations that Defendant-Appellant used two delivery services, as well as answering machines. Not only is there no evidence to support that inference, much less a conclusion, there was absolutely no evidence that Defendant-Appellant telephoned anyone. For all the record shows, it is just as likely that the passenger, Rebescher, made all of the preliminary arrangements, had all of the connections to the answering service and the ultimate destination of the package, and that he (Rebescher) had requested Defendant-Appellant to drive him around so that he could effect a delivery of the package, the contents of which were known to him (Rebescher). Even if the facts were that Defendant-Appellant was told at the airport that the package contained cocaine and subsequently "kept an eye" on Mr. Lopez out of nervousness, that would not make him guilty of attempting to exercise physical control over the contents of those packages. In other words, there is absolutely no evidence that, had Mr. Lopez been allowed to take the package to its ultimate destination, Defendant-Appellant would have exercised control over the cocaine. It is too well established for further argument that mere presence, even coupled with knowledge, is insufficient to warrant a conviction under attempt or conspiracy.

In *United States v. Galvan,* 693 F.2d 417 (5th Cir. 1982), a drug conspiracy conviction was reversed where, although there was evidence of telephone calls made back and forth from the residences of the accused and a co-conspirator, the Government did not prove that the accused placed the telephone calls. True enough, the evi-

dence in that case raised a strong suspicion of guilt; nonetheless, the Government failed to connect the Defendant with making the calls, referred to as being a "flurry of activity" and, even coupled with the other damaging evidence, was insufficient as a matter of law to sustain the conviction.

To find Defendant-Appellant guilty of attempted possession of the cocaine with intent to distribute, it would call for speculative inferences that he knew the contents of the cargo box; that he was connected with the address listed on the cargo box; that he had made one or more telephone calls, either to the airline, W. R. Zane, or the suburban delivery service; that he was the one that had been and continued to use Richard Freedman as an alias; and that he intended to exercise physical control over the contents of the cargo box once it reached its ultimate destination.

The record not only fails to show those matters as facts, but would not support them even as inferences.

CONCLUSION

Defendant-Appellant was denied due process of law by the unnecessary and unduly suggestive pretrial identification procedure, which gave rise to a very substantial likelihood of an irreparable misidentification of him by the witness, Mr. Lopez, Sr. The focus of inquiry is not whether, after considering the entire appellate record, Mr. Lopez, Sr. was probably right about Defendant-Appellant being the one who gave him money in the parking lot, but whether Mr. Lopez, Sr.'s in-court identification was improperly tainted by the unduly suggestive pretrial procedure. Simply put, had the law enforcement

officers not successfully suggested to Mr. Lopez, Sr. who to identify, could it reasonably be said that Mr. Lopez, Sr. nonetheless could have identified Defendant-Appellant in court? Due process of law requires that a witness's in-court identification stem from whatever was observed at the time and on the occasion in question. When a confused, uncertain witness is subjected to the type of procedure as in the case at bar, he draws from his memory of the pretrial identification procedure and subsequent events, such as seeing the accused in the courtroom with his lawyer. That is the due process deprivation and, given Mr. Lopez, Sr.'s uncertainty at the time of the "lineup", if he was certain of his identification at that time of trial, that demonstrates what due process of law protects against.

For each and all of the above and foregoing reasons, Defendant-Appellant respectfully prays that the Honorable Fifth Circuit Court of Appeals will in all things grant this his Motion for Panel Rehearing, and that his conviction will be reversed, and, because the evidence is insufficient as a matter of law to sustain his conviction, that a judgment of acquittal will be ordered forthwith.

Respectfully submitted,

DeGUERIN & DICKSON

/s/ LEWIS DICKSON
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Petition for Panel Rehearing has been served on Mr. James E. Gough, Appellate Division, United States Attorney's Office, by mailing same to him at P. O. Box 61129, Houston, Texas 77208, on this the 3rd day of July, 1984.

/s/ LEWIS DICKSON
Lewis Dickson

APPENDIX C

UNITED STATES of America,
Plaintiff-Appellee,

v.

William Robert WOOLERY,
Defendant-Appellant.

No. 83-2606.

United States Court of Appeals,
Fifth Circuit.

Aug. 21, 1984.

Defendant was convicted in the United States District Court for the Southern District of Texas, Carl O. Bue, Jr., J., of attempted possession of cocaine with intent to distribute, and the Court of Appeals, 735 F.2d 818, affirmed. On petition for rehearing, the Court of Appeals held that: (1) suggestiveness of lineup procedure did not create very substantial risk of misidentification so as to render identification evidence inadmissible, and (2) evidence creating inference that defendant knew of contents of parcel he picked up was sufficient to sustain conviction.

Reaffirmed.

Lewis Dickson, Houston, Tex., for defendant-appellant.

Daniel K. Hedges, U.S. Atty., James R. Gough, Asst. U.S. Atty., Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 6/20/84, 5th Cir. 1984, 735 F.2d 818)

Before JOLLY, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:

No member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for rehearing en banc is DENIED.

In his petition for panel rehearing, the defendant-appellant William Woolery raises two issues of law which he argues the panel decided incorrectly. First, Woolery contends that the panel erred in finding that the in-court identification of Woolery by Mr. Lopez was reliable in spite of the fact that four of the six factors delineated by the Supreme Court in *Manson v. Brathwaite,* 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), militate in favor of a finding that the identification was unreliable. Second, Woolery argues, as he did in his original appellate brief, that the evidence presented at trial was insufficient to sustain his conviction for attempted possession of cocaine with intent to distribute it. We grant the petition for panel rehearing and write this opinion solely to clarify the panel's position on these two issues and to comment upon a "misapprehension of fact" which Woolery contends was committed by the panel.

[1, 2] We remain convinced that the in-court identification of Woolery satisfies the "totality of circumstances" test of reliability established in *Manson.* We note here

that the fact that some, or even a majority, of the *Manson* factors weigh against the reliability of the identification is not conclusive. We must examine all of the factors and decide, whether, on the whole, the suggestiveness of the line-up created a "very substantial risk of misidentification." *United States v. Atkins,* 698 F.2d 711, 713 (5th Cir. 1983). We discussed in detail in the panel opinion the reasons for our conclusion that Mr. Lopez's identification of Woolery was sufficiently reliable to have been admissible. Although Woolery is correct in pointing out that some of the *Manson* factors support his position, it is equally true that certain of the factors strongly suggest that Lopez's identification was not erroneous. Particularly, Lopez had an excellent opportunity to observe Woolery in good light at close range. In addition, the time span between the observation and the line-up was very brief. Finally, Lopez's description of Woolery was quite detailed. Considering all of the circumstances, we conclude that the suggestiveness of the line-up procedure did not create a very substantial risk of misidentification.

[3, 4] With respect to Woolery's contention that the evidence presented by the government is insufficient to support his conviction for attempted possession of cocaine, we note simply that the evidence was sufficient as a matter of law. Woolery's argument that the evidence does not establish that he knew of the contents of the parcel containing cocaine is primarily a jury argument. The jury's inference that Woolery knew of the contents, when the evidence showed that he picked up the parcel and affirmatively responded to the name given the delivery company, was certainly permissible. The fact that the evidence would also support an inference of innocence is not a ground for reversal of the jury verdict. *United*

States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc).

Finally, we wish to make it clear that our holding does not rely on the "misapprehension of fact" that the evidence demonstrated that Woolery personally contacted the delivery service or personally made use of the telephone answering machines. We did not say or intend to say in the panel opinion that Woolery did so. What we did intend to say is that the evidence amply supports the inference that Woolery was a part of a scheme in which these devices were used. The evidence sufficiently connects Woolery to the attempted crime to sustain his conviction.

For the reasons stated herein, we conclude that the arguments raised in Woolery's petition for rehearing are without merit. We reaffirm the holding of the panel opinion.

APPENDIX D

Q: (by Mr. DeGuerin): And then when they got you all the way in the garage and shut the door in a hurry, that kind of frightened you, didn't it?

A: That really—I knew I was in trouble then, I didn't know what was going to happen.

Q: Then when they got you in there and shut the door on you and the agent came up and identified himself and said, "You are in a heap of trouble," that scared you even more, didn't it?

A: It sure did.

* * *

Q: Were they being cordial with you, or were they being kind of tough with you?

A: Well, they were being firm, you know, but they wasn't—

Q: Did any of the agents tell you that someone was going to go to jail and it might be you?

A: Yes. Special Agent Mike Tiffin told me that when we were down there at the Customs office.

Q: That concerned you, didn't it?

A: It sure did.

* * *

Q: And now, before you got to the Customs office you were trying to explain what you were doing there to Mr. Tiffin and Mr. Perry, weren't you?

A: No, just Mr. Perry.

Q: Mr. Perry. You were trying to explain what you were doing there to Mr. Perry?

A: Right.

Q: And were they taking the attitude with you of skepticism, that they didn't believe you?

A: Yes.

Q: And you were afraid that they were not going to believe you and you were going to get caught up in this and have to go to jail, weren't you?

A: Yes.

Q: So you were quite concerned and scared?

A: Yes.

Q: Now, during the time that this was going on you were trying to explain and they seemed not to be believing you, and they told you you were in trouble. Did you overhear someone say that they caught two men outside?

A: Yes.

* * *

Q: And then did anyone tell you that they were going to have a line-up?

A: No, not until we were in that room quite a while. They said they was going to get a line-up and if I didn't want to go to the line-up, they would make me go to one the next day.

Q: So you figured you didn't have much choice about it, did you?

A: No, not really.

Q: And did one of the officers tell you that you'd better hope that the man that was at Denny's was in that line-up?

A: Well, yes.

Q: Who told you that?

A: Mike Tiffin.

Q: So at the time you went and looked in to the line-up, or went in the line-up room, you knew that you

might be in some trouble, that the officers apparently didn't believe your story, that they told you that someone was going to go to jail and it might be you, and they told you you better hope that the man you saw on the Denny's parking lot was in that line-up, correct?

A: Right.

* * *

Q: And you thought it was the man who was number three?

A: Right.

Q: You told them that?

A: Yes.

Q: Now, who was the agent that you were telling that you thought it was man number three?

A: Mike Tiffin.

Q: You, of course, were hoping that you had picked out the right man, weren't you?

A: Yes.

Q: Because it meant, if you picked out the right man it meant that you would get free and they would let you go and you and your son could go on your way, correct?

A: Right.

Q: And if you hadn't, it meant you were going to jail?

A: I guess so.

* * *

Q: So after you told him you thought it was the number three man, he said, "Well, are you sure about that?"

A: Yes.

Q: That caused you to doubt yourself, didn't it?

A: Yes.

Q: And at some point, now, you learned that the number three man was a policeman, didn't you?

A: Yes.

Q: Now, between the first time you looked into the room and the second time you looked into the room, they brought your son up, didn't they?

A: Right.

Q: And told him just to look in through the door?

A: Yes.

Q: And you were in earshot of him doing that and knew that he was looking in the door?

A: Yes.

Q: And that was after Mr. Tiffin had questioned you about whether you were really sure about that number three man you picked out, right?

A: Yes.

Q: And they you heard your son say, "It's the man on the end"?

A: Yes.

Q: Now, regardless of whether you think that influenced you at all, or not—I'm not asking you that question—after that sequence of events is when you looked in the room again and picked out the man on the end, isn't it?

A: Yes.

Q: All right. So then by the time you went to write up the statement you knew that you and your son had both eventually picked out the same man, didn't you?

A: Yes.

Q: Now, at some point one of the officers told you that the man you picked out was one of the men that was arrested, didn't they?

A: I believe so, yes.

Q: Do you remember which officer told you that the man you picked out, the man your son picked out, was one of the two men that were arrested outside?

A: I think it was Mr. Tiffin. There weren't too many people I talked to in there.

Q: And sure enough, they let you go that day, didn't they?

A: Yes.

Q: And you felt relieved that you had picked out the man that had been arrested outside and that you and your son had been allowed to go home, rather than you going to jail, didn't you?

A: Yes. * * *

[TR. pp. 182-190]

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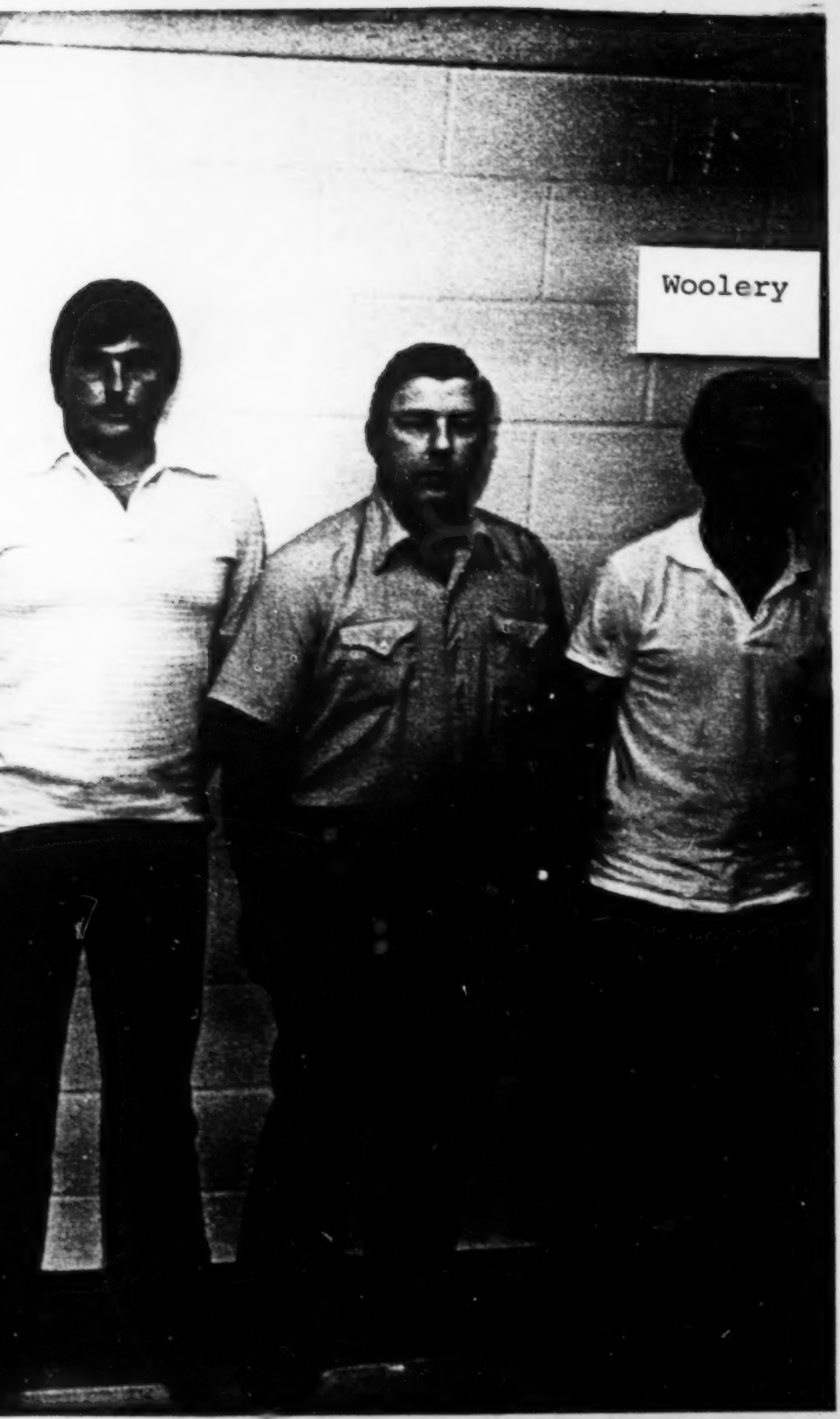
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CLERK

No. 84-635

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM ROBERT WOOLERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an eyewitness's in-court identification of the petitioner was required to be excluded from evidence on the ground that it was rendered unreliable by a suggestive line-up.

2. Whether the evidence was sufficient to sustain petitioner's conviction for attempted possession of cocaine.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-635

WILLIAM ROBERT WOOLERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The principal opinion of the court of appeals (Pet. App. 1a-10a) is reported at 735 F.2d 818. The opinion denying the petition for rehearing (Pet. App. 24a-27a) is reported at 740 F.2d 359. An earlier opinion of the court of appeals, which reversed a pre-trial order suppressing evidence, is reported at 670 F.2d 513, cert. denied, 459 U.S. 835.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on June 20, 1984. A petition for rehearing was denied on August 21, 1984 (Pet. App. 24a). The petition for a writ of certiorari was filed on October 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of attempted possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 846 and 841(a)(1). He was sentenced to a term of four years' imprisonment and a special parole term of three years.[1]

1. The evidence is summarized in the opinions of the court of appeals. See Pet. App. 2a-4a; 670 F.2d 513, 514-515, cert. denied, 459 U.S. 835 (1982). In brief, it showed that on August 6, 1979, customs inspectors in Houston, Texas, discovered cocaine hidden in an air freight shipment of saddles from Colombia. The shipment was addressed to a "Richard Freedman," and a telephone number was indicated. After an airline official left word with the answering service at that telephone number, a man identifying himself as Freedman telephoned the airline on August 9 and said that the package would be claimed that day. Freedman called a warehouse company to pick up and store the package, and he arranged for a delivery company to obtain the package from the warehouse. Lawrence Lopez, a driver for the delivery company, was sent by his dispatcher to a parking lot near the warehouse to meet Freedman and receive his instructions. Shortly after lunchtime Lopez, accompanied by his 11-year-old son, arrived at the parking lot in his pickup truck and waited for 45 minutes until he was met by two men in a Mercedes. The driver of the Mercedes got out and approached the driver's side of the truck. Lopez said, "Mr. Freedman?," and the man replied, "Yes." Lopez then

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[1]Petitioner has not challenged, either in this Court or the court of appeals, the special parole term he received for the attempt offense. See generally *Bifulco* v. *United States*, 447 U.S. 381 (1980). Petitioner is free to raise this issue in a proceeding under Fed. R. Crim. P. 35 or 28 U.S.C. 2255.

left the truck and stood two or three feet from Freedman. Freedman paid Lopez $200 in cash for delivery and storage services, instructed him to deliver the package to a Houston address, obtained a receipt, and left.

Lopez returned to his truck and drove it to the warehouse; he was followed by the two men in the Mercedes. When Lopez stopped at the front of the warehouse, so did the Mercedes, which parked across the street. The driver got out of the car, walked around to the front, and raised the hood as if he were checking the engine; however, the driver never took his eyes off Lopez's truck. Lopez then moved his truck to the rear of the warehouse, and again the Mercedes followed, parking within sight of both Lopez and his truck.

When Lopez entered the warehouse to pick up the package, he was met by police, who informed him that the shipment contained contraband and that he was "in trouble." At this point, Lopez gave the officers a description of Freedman and the address to which the package was to be delivered (which was that of the telephone answering service). The officers then pulled up behind the Mercedes and blocked its exit. The driver of the Mercedes put his car in reverse and backed into the officers' vehicle. After the impact, the officers drew their guns, closed in on the Mercedes, and ordered the occupants out of the car. When the occupants did not respond, an officer opened the door on the driver's side and observed a pistol in a visible side compartment. The occupants of the Mercedes, one of whom was petitioner, were arrested.

Shortly thereafter, an officer arranged for Lopez and his son to view a line-up at a nearby customs office. Lopez entered the line-up room and selected a man who was not petitioner. A DEA agent asked Lopez if he was sure, and Lopez stated that he was not. Lopez's son, who had been with him in the parking lot, stepped to the door. Within the hearing of his father, he pointed to petitioner as the man in

the parking lot. An agent asked Lopez again if he was sure about his selection, and encouraged him to take another look. Lopez then selected petitioner as the man he had met in the parking lot who had identified himself as Freedman.

At trial, both Lopez and his son presented in-court identifications of petitioner as the man they had seen in the parking lot. Lopez recalled the description he had given the officer that day, stating that the man was 5' 7" or 5' 8" tall, had a beard and mustache, and wore a white shirt, blue jeans, and brown boots. Lopez stated that his in-court identification of petitioner was based both on what he had seen in the line-up and what he recalled from the day in the parking lot.

2. On petitioner's appeal, the court below found that the line-up identification by Lopez was impermissibly suggestive. However, applying the factors set out in *Manson* v. *Brathwaite,* 432 U.S. 98 (1977), it concluded on the basis of the record in this case that the suggestive line-up did not lead to a substantial likelihood of misidentification. Accordingly, it upheld the admissibility of Lopez's in-court identification of petitioner (Pet. App. 5a-8a, 25a-26a).

ARGUMENT

1. Petitioner contends (Pet. 5-8) that Lopez's in-court identification should have been excluded at trial because of the likelihood that it was tainted by the suggestive line-up. This fact-bound argument does not warrant further review.

It is well settled that suggestive procedures will not require suppression of a witness's identification if it is reliable notwithstanding the improper procedure. See *Manson* v. *Brathwaite,* 432 U.S. 98, 114 (1977); *Neil* v. *Biggers,* 409 U.S. 188, 199-200 (1972); see also, *e.g., United States* v. *Burke,* 738 F.2d 1225, 1228-1229 (11th Cir. 1984); *O'Brien* v. *Wainwright,* 738 F.2d 1139, 1140-1143 (11th Cir. 1984).

"[R]eliability is the linchpin in determining the admissibility of identification testimony * * *." *Manson* v. *Brathwaite,* 432 U.S. at 114.

In evaluating reliability, this Court has adopted a "totality of the circumstances" test that requires consideration of five factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the time between the crime and the confrontation. These factors must then be weighed against the effect of the suggestive identification. *Manson* v. *Brathwaite,* 432 U.S. at 114-117; *Neil* v. *Biggers,* 409 U.S. at 199-200.

The court below applied these factors to the facts in this case in concluding that there was no substantial likelihood of misidentification at the line-up and consequently that Lopez's in-court identification of petitioner at trial was admissible in evidence. The court determined that the reliability of the line-up was supported by the facts that (1) in the parking lot Lopez had viewed petitioner face-to-face in broad daylight for several minutes; (2) Lopez's description of petitioner to the police was detailed and accurate; (3) although somewhat uncertain at the line-up (where petitioner stood the farthest away from him), Lopez chose a person who closely resembled petitioner with respect to height, facial hair, and hairline; and (4) the line-up took place on the afternoon that the arrest had occurred. Militating against reliability were the factors that (1) at the time of their meeting in the parking lot, Lopez had no reason to give any special attention to petitioner's physical appearance, and (2) Lopez initially was uncertain at the line-up and first

selected a man other than petitioner.[2] Weighing these competing factors, the court found that Lopez's identification was not rendered unreliable by the suggestive line-up.

Petitioner contends that the court of appeals erred in reaching this conclusion because half or more of the relevant factors indicated that the identification was unreliable. As discussed above, however, the court determined that the majority of the considerations demonstrated the reliability of the identification. In addition, and more importantly, petitioner misconstrues the judicial function simply to involve an exercise in arithmetic. Contrary to his view, application of the governing legal standard calls for a "judgmental process" directed to the "fairness" required by due process. *Manson* v. *Brathwaite,* 432 U.S. at 113. The court below properly understood the required inquiry and expressly applied the legal principles established by this Court to the particular facts in the present case. Petitioner has advanced no reason that would warrant further review.[3]

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[2]The court also noted Lopez's frank acknowledgement at trial that his in-court identification of petitioner was a product of both the meeting in the parking lot and the line-up. However, since the court concluded that the line-up was not itself unreliable, the in-court testimony was clearly admissible irrespective of whether it was influenced by the line-up.

[3]Petitioner also contends (Pet. 5, 8) that the decision below conflicts with earlier decisions of the court of appeals. Any intra-circuit conflict that may exist, however, does not justify this Court's review. See *Wisniewski* v. *United States,* 353 U.S. 901 (1957). At all events, the decisions cited by petitioner are distinguishable on their facts. In *Swicegood* v. *Alabama,* 577 F.2d 1322, 1325-1329 (5th Cir. 1978), the court, applying *Manson* v. *Brathwaite, supra,* found that a suggestive line-up led to a sufficient possibility of mistaken identification because, inter alia, the witnesses had only a fleeting opportunity to view the criminal and provided only a generalized description to the police. In *United States* v. *Cueto,* 611 F.2d 1056, 1062-1064 (5th Cir. 1980), the court held that a photographic display involving a single picture was impermissibly suggestive and that the reliability of the identification was very

2. Petitioner also contends (Pet. 9-10) that the evidence was insufficient to sustain his conviction for attempted possession of cocaine with intent to distribute it. He asserts that there was no evidence showing that he knew what the packages contained or that he had a connection with the shipment from Colombia. This argument is without merit.

First, contrary to the premise of petitioner's contention, it is not necessary for the government's evidence "to rule out every hypothesis except that of guilt beyond a reasonable doubt." *Jackson* v. *Virginia,* 443 U.S. 307, 326 (1979); see also *United States* v. *Rivera-Sola,* 713 F.2d 866, 869 (1st Cir. 1983), quoting *United States* v. *Manley,* 632 F.2d 978, 987 (2d Cir. 1980), cert. denied, 449 U.S. 1112 (1981); *United States* v. *Bell,* 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd on other grounds, No. 82-5119 (June 13, 1983). Rather, the evidence, whether direct or circumstantial, is sufficient if, viewed in its entirety in the light most favorable to the government, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. See *Jackson* v. *Virginia,* 443 U.S. at 319; *Holland* v. *United States,* 348 U.S. 121, 139-140 (1954). As the court below correctly concluded (Pet. App. 9a, 26a), this standard is satisfied by the evidence here, including that showing that petitioner answered to the name of "Freedman" in his meeting with Lopez, followed the various movements of Lopez's delivery truck containing the concealed shipment of cocaine, got out of the car and pretended to be checking the engine in order to continue his observation of Lopez's truck, and rammed the officers' car when they attempted to stop him. Petitioner thus " 'engag[ed] in

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weak under *Manson* v. *Brathwaite* because, among other things, the witness did not subsequently make a positive identification of the defendant and had not provided a detailed description of the criminal to the authorities.

activity centering on known contraband, activity that had no legitimate or logical explanation' " (*id.* at 9a). Petitioner's contention to the contrary is essentially "a jury argument" (*id.* at 26a), and the proof was adequate to allow the jury to find against petitioner.

Nor was the evidence insufficient as a matter of law to establish an attempt because petitioner had been involved in "mere preparation" rather than in a "substantial step" toward the substantive offense.[4] In considering what constitutes an attempt, the "federal courts have rather uniformly adopted the standard found in Section 5.01 of the American Law Institute's Model Penal Code (Proposed Official Draft 1962). This standard provides that the requisite elements of attempt are (1) an intent to engage in criminal conduct; and (2) conduct constituting a 'substantial step' towards the commission of the substantive offense which strongly corroborates the defendant's criminal intent." *United States* v. *Rivera-Sola,* 713 F.2d 866, 869 (1st Cir. 1983), citing, *e.g., United States* v. *Joyce,* 693 F.2d 838, 841 (8th Cir. 1982); *United States* v. *Monholland,* 607 F.2d 1311, 1318-1320 (10th Cir. 1979); and *United States* v. *Mandujano,* 499 F.2d 370, 376-377 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975). The court below explicitly recognized the distinction between "mere preparation" and attempt (Pet. App. 9a-10a). In this case, however, petitioner's efforts to obtain custody of the shipment from Colombia, including his meeting with Lopez and his surveillance of Lopez's truck, were clearly a substantial step toward gaining possession of the cocaine and confirm his criminal intent and commitment to the venture.

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[4]The jury was instructed that, in order to convict, it had to find that petitioner's act had so surpassed the preparation stage that, if not interrupted, it would have resulted in the commission of a crime (Pet. 9). Petitioner does not challenge this instruction.

Finally, the decision below does not, as petitioner suggests, conflict with decisions in other circuits. As the court noted in *United States* v. *Rivera-Sola, supra,* the federal courts appear to have adopted a consistent standard for attempt, and that is the standard that the Fifth Circuit has applied in both this case and others. See, *e.g.,* Pet. App. 9a-10a; *United States* v. *Mandujano, supra.* Indeed, the very decisions of the Eighth and Tenth Circuits that petitioner cites to support his claim of a conflict followed the same standard and relied on opinions of the Fifth Circuit. See *United States* v. *Joyce,* 693 F.2d at 841-842, and *United States* v. *Monholland,* 607 F.2d at 1316-1320; see also, *e.g., United States* v. *Bunney,* 705 F.2d 378, 381-382 (10th Cir. 1983). While the attempt inquiry is necessarily "fact specific" (*United States* v. *Rivera-Sola,* 713 F.2d at 866), there is no conflict on the applicable legal standard.[5]

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[5]In addition, *Joyce* and *Monholland* are distinguishable from the instant case. In *Joyce,* the court held that the defendant had not engaged in an attempt because he had "abandoned" his intention to violate the law "prior to the commission of a necessary and substantial step to effectuate" the planned purchase of cocaine (693 F.2d at 841); thus, even though the defendant had both "the opportunity and ability to commit the completed offense, * * * [he] refused to engage in conduct constituting a 'substantial step' toward commission of the completed offense" (*id.* at 842). See also *United States* v. *Rivera-Sola,* 713 F.2d at 871 ("in *Joyce* the defendant voluntarily withdrew from his planned purchase"). In contrast, in this case and in most others, the failure to complete the consummated offense occurred not because of voluntary abandonment but "because of events beyond the control of the attemptor" (*United States* v. *Joyce,* 693 F.2d at 841). In *Monholland,* the court found that the defendant's activity "was nothing more than preliminary discussion" and did not involve "a tangible act which constituted proximate and tangible evidence of a real effort" (607 F.2d at 1317); this "abstract talk" and "preliminary" and "preparatory discussion" (*id.* at 1318) was held insufficient to establish an attempt. Here, on the other hand, petitioner's conduct was clearly and directly related to the commission of the substantive offense and constituted a substantial step toward that end.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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